No. 83-1594

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOSEPH A. LaSCALA,

Petitioner,

-against-

BURLINGTON NORTHERN, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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The following is a list of the parent company and its subsidiaries pursuant to Rule 28.1 of the Supreme Court Rules.

Parent Company: Burlington Northern Inc.

Subsidiaries: Burlington Northern Railroad Company; BN Transport Inc.; El Paso Exploration Company; El Paso Hydrocarbons Company; El Paso Natural Gas Company; Glacier Park Company; Meridian Land and Mineral Company; Milestone Petroleum Inc.; and Plum Creek Timber Company, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Regulations:

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STATEMENT OF THE CASE

Petitioner Joseph A. LaScala, a switchman in the employ of respondent Burlington Northern Railroad Company, was injured in its Sioux City, Iowa railroad yards on April 15, 1980, when he attempted to board the front platform of a caboose coupled to the rear of outbound Train X-59, in violation of respondent's Safety Rule 73B, which provides that "Employees must, in boarding a caboose, get on at the rear platform." (T. 161, 351)

At trial, petitioner presented several theories of liability to the Court and the jury, among them that respondent was negligent for not properly instructing petitioner on the

safety rules, and for not providing petitioner with a copy of those rules; for not properly maintaining the track in the area of the accident; and for allowing debris and accumulations of grain and meal to accumulate in the walkway between the tracks. Petitioner also claimed that the caboose involved in the accident was defective, and that a partially applied handbrake on one of the 112 cars in Train X-59 amounted to a violation of the Federal Safety Appliance Act. Petitioner called three witnesses on the liability issue: petitioner himself, Richard Newburn, the rear brakeman on Train X-59, and Vito Dattolico, local chairman of the switchman's union. A statement by Anthony Pierce, the engineer of Train X-59, ostensibly supporting petitioner's position was read into evidence. Pierce's statement, however, supported respondent on the Safety Appliance Act issue. (T. 326, 327)

Respondent argued that it had not been negligent in any respect; that it had not violated the Safety Appliance Act; and that the accident and petitioner's injuries were due solely to his own negligence in attempting to board the front platform of the caboose in violation of Safety Rule 73B. Respondent called fourteen witnesses on the liability issue.

John Button testified that petitioner had undergone a five-day training session which included classroom and field training prior to his employment with the respondent, and had scored 95 percent on the written test given at the conclusion of the course. (T. 151, 345) Respondent's Safety Rule 73B was specifically covered during the course. (T. 161, 351) Six witnesses testified that the proper and safe method for boarding a moving caboose was by means of the rear platform. (T. 424-425, 486-487, 542, 592, 610, 627)

The track in the area of the accident had been examined pursuant to established company procedures two days prior to the accident and no defects had been found. (T. 478-480, 482) This same track had been inspected by a Federal Railroad Administration track inspector several months before the accident. His report showed no defects. (T. 504-508) The accident scene had been inspected within 20 minutes after the accident had occurred and no obstructions, defects or accumulations of grain and meal on the walkway were found. (T. 582, 585, 606) Approximately two years earlier the area along this track had been excavated and filled with rock and chips to facilitate drainage. (T. 608)

The caboose involved had been serviced at Alliance, Nebraska several months before the accident and had undergone visual inspection as it entered the Sioux City yards on the day of the accident. No defects were found. (T. 413-417, 636-639) The caboose had also undergone a detailed inspection on its final arrival at Willmar, Minnesota after the accident and again, no defects were found. (T. 450-457)

Train X-59 had undergone a roll-by inspection in the Sioux City yards shortly before the accident and no indications of a tightly-tied handbrake on any of the cars was noted. (T. 641) Given the absence of either skidding or a distinctive chattering noise from any of the cars during the roll-by inspection, witnesses testified that the handbrake could not have been tied down firmly enough to affect the movement of the train, and would most likely have been tied down in a rather loose manner. (T. 558-559, 560, 574-577) Engineer Pierce, whose statement was offered into evidence by petitioner, stated that he found the air brakes to be in proper working condition, and noticed nothing unusual in the operation of the train. (T. 326, 327)

The trial court instructed the jury on the Federal Employers Liability Act (T. 774), and the Federal Safety Appliance Act. (T. 775-776) On the issue of causation, the trial judge charged the jury that: "Injury or damage is said to be caused or contributed to by an act or a failure to act, when it appears from a preponderance of the evidence in the case, that the act or omission played any part, no matter how small, in bringing about or actually causing the injury or damage." (T. 779)

The jury returned a special verdict in which it found that respondent was not negligent, that the Safety Appliance Act had not been violated, and that petitioner was negligent. After denial of his post-trial motion, petitioner appealed the case to the Minnesota Supreme Court, raising the following issues: (1) whether the trial court committed reversible error in refusing to give petitioner's requested jury instruction No. 47; (2) whether the trial court committed reversible error in not ruling as a matter of law that respondent had violated the Safety Appliance Act; (3) whether the trial court committed reversible error in refusing to allow an interrogatory answer to be read into evidence; and (4) whether the fact that the jury foreman had known one of respondent's witnesses during his high school days had so prejudiced the petitioner that a new trial was warranted. Petitioner has again raised the first two issues in his petition for a writ of certiorari.

ARGUMENT

THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY REGARDING FEDERAL RAILROAD ADMINISTRATION REGULATIONS

Petitioner submitted his requested instruction No. 47 to the trial judge in chambers immediately prior to the con-

clusion of the instruction conference. This instruction consisted of language charging the jury that violation of Federal Railroad Administration rules raised a rebuttable presumption of negligence on the part of respondent. Attached to and incorporated within this instruction were reproductions of 49 C.F.R. §213.9, §213.13, §213.33, §213.63, and §213.103. The trial judge refused to give requested instruction No. 47 on the ground that petitioner had not presented any evidence at trial regarding the Federal Railroad Administration regulations. (T. 701)

Petitioner did not submit the Federal Railroad Administration regulations into evidence during his case in chief, nor did he call any witnesses to testify to any violations of the regulations. This lack of evidence is particularly important when one reads the regulations as submitted to the trial court. 49 C.F.R. §213.9 refers to exceptions found in other sections of the regulations, yet fails to delineate what those other sections involve. Section 213.13 deals with loaded and unloaded track without explaining exactly what these terms mean. Of particular opacity to even an intelligent layman is Section 213.63, which deals with deviation and track elevation. This regulation contains language referring to "deviation from zero cross level" and "designated elevation on curves between spirals." These regulations are technical in nature, and in the absence of any testimony dealing with the regulations would have only tended to confuse the jury.

The petitioner's failure to present any evidence on the regulations is of particular significance on two counts. Petitioner produced photographs at trial which were taken by his attorneys approximately two weeks after the accident. (T. 269) Thus, petitioner, his attorneys and any retained ex-

perts had ample opportunity to inspect the location of the accident shortly after the occurrence. In addition, and as the trial judge noted, the petitioner had listed a track expert as a potential witness on the first day of trial, but had failed to call this expert as a witness during trial. (Hearing on Plaintiff's Motion for a New Trial, T. 13.)

Requested instruction No. 47 was also inconsistent with statements made by petitioner's counsel earlier in the instruction conference. Petitioner's counsel had withdrawn his requested instruction specifically delineating the condition of the track as an element of negligence on the part of respondent. (T. 687-688) The trial judge asked petitioner's counsel five times whether he wished to withdraw this request. Each time petitioner's counsel unequivocally stated that he wanted the requested instruction withdrawn:

> THE COURT: Well, you have in fact requested that and now you're telling the Court, I want it clear in the record, you do not want the Court to specify the particulars in which the Defendant is claimed to be negligent?
>
> MR. YAEGER: That's true.
>
> THE COURT: You are withdrawing that?
>
> MR. YAEGER: Yes.
>
> THE COURT: Okay. And having in mind what that case says, that it's error for the Court to omit it from the charge, and if requested, I suppose. I want to be absolutely certain that you don't want that given?
>
> MR. YAEGER: You may be assured that we withdraw the request, and you may be absolutely certain that we do not ask for that.
>
> THE COURT: Okay. And I am going to set out the record what has been withdrawn, and that is that the

defendant was negligent in one or more of the following particulars:

'1. Failure to provide Joseph LaScala a safe place to work, by (a) permitting grain meal and dust to accumulate in unsafe amounts along side the Railroad's tracks; (b) failing to inspect and repair damaged and rotted rails and ties; and (c) failing to provide sufficient ballast between and along side the rails and ties;

2. Failure to provide Joseph LaScala with adequate training and instruction concerning Railroad safety rules and procedures;

3. Failure to provide Joseph LaScala with a copy of the railroad safety rule booklet; and Second, that the defendant's negligence caused or contributed in part to Joseph LaScala's injuries and damages.'

Now, that requested instruction is withdrawn, is that correct?

MR. YAEGER: That is correct.

THE COURT: There it is. I gather you don't want the Court to make any comment about the particularities of the Defendant's negligence? I gather that to be the case, but I want it stated on the record.

MR. YAEGER: That's true. I don't think we need to waste the time in going into that. (T. 690-691)

Petitioner's counsel requested instead that the trial judge charge the jury generally on the issue of negligence. (T. 691-692) Thus, petitioner's attorney first withdrew a specific requested instruction, asking instead for a general charge, and then inconsistently requested a highly technical specific instruction on regulations which had not been admitted into evidence, and on which he had not presented any testimony.

The only case which petitioner cites in support of his proposition that the trial judge erred by not giving requested instruction No. 47 is *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957). However, *Rogers* involved neither FRA regulations nor jury instructions. *Rogers* simply held that: "Under this statute [FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." 352 U.S. at 506. Thus, *Rogers* is not on point.

The test for the sufficiency of jury instructions in FELA cases is whether the entire charge, when taken as a whole, correctly sets forth the applicable law, and is "fair and adequate based on the evidence presented and the contentions aired by the parties in the trial court." *Scrivener v. Atchison, Topeka and Santa Fe Ry. Co.*, 409 F.2d 1356, 1357 (5th Cir. 1969). An instruction based on an issue not before the jury need not be given. *Harris v. Chesapeake and Ohio Ry. Co.*, 358 F.2d 11, 14 (7th Cir. 1966). In the instant case, the Federal Railroad Administration regulations had not been presented to the jury during trial. Neither was there testimony that the track was defective at the point where the accident occurred. Thus, the requested instruction was properly refused.

The trial judge did instruct the jury on the Federal Employers Liability Act (T. 774) and the Federal Safety Appliance Act. (T. 775-776) The trial judge also properly instructed the jury on the correct standard of causation in FELA cases pursuant to *Rogers, supra,* stating the test as "that the act or omission played any part, no matter how small, in bringing about or actually causing the injury or damage." (T. 779) In addition, petitioner's counsel was free to argue his theory of negligence based upon defective

trackage to the jury, and did so during trial and in final argument. (T. 737-743) Accordingly, the trial court's instructions, taken in their entirety, correctly stated the applicable law in FELA cases.

THE TRIAL COURT PROPERLY PERMITTED THE ISSUE OF RESPONDENT'S ALLEGED VIOLATION OF THE FEDERAL SAFETY APPLIANCE ACT TO GO TO THE JURY

Petitioner contends that the trial court erred by refusing to rule as a matter of law that respondent had violated Sections 1 and 9 of the Federal Safety Appliance Act. 45 U.S.C. §§1-10 (1976). As pointed out by petitioner, the Safety Appliance Act and 49 C.F.R. §232.1 required that 85 percent of the cars in a train have their power brakes used and operated by the engineer. Petitioner is also correct in stating that 100 percent of the cars which comprise the 85 percent must be equipped with power brakes which can be used and operated by the engineer.

While petitioner goes to great lengths to establish this proposition of law, which respondent does not dispute, he does not explain why the evidence was so clear as to require the trial court to rule as a matter of law that respondent had violated these provisions. The only evidence which petitioner points to is testimony from one witness, Richard Newburn, that a single handbrake on one car in the 112-car train was tied down. Petitioner offered no evidence whatsoever that a partially tied down handbrake would have prevented the power brakes of the car in question from being "used and operated by the engineer." Thus, petitioner's evidence entirely failed to address this crucial point.

This case can be readily distinguished from those cited by the petitioner. In *New York Central R.R. Co. v. United States*, 265 U.S. 41 (1924) and *United States v. Atchison*,

Topeka and Santa Fe Ry. Co., 205 F.Supp. 589 (S.D. Cal. 1962), it was undisputed that the power brakes on one or more of the involved cars could not be used and operated by the engineer. In the present case, respondent introduced evidence that a partially tied down handbrake would not adversely affect the ability of the engineer to use and operate the power brakes on that car. Petitioner offered no evidence on this point. It is also noteworthy that petitioner offered no evidence with respect to the question of how far the handbrake had been tightened, even though the head brakeman who had released the handbrake was available and could have been called as a witness at trial.

The trial judge, in ruling upon petitioner's motion for a directed verdict, recognized the complete absence of evidence in support of petitioner's position that the engineer could not operate the power brakes on the train. (T. 674-675) At the time petitioner made his motion for a directed verdict, the trial court asked his counsel to identify the evidence upon which he relied in support of his motion. Petitioner's counsel was unable to point to any specific evidence to the effect that the engineer was unable to operate the power brakes on the train. (T. 670-675)

In the absence of any evidence indicating that the engineer was unable to use and operate the power brakes on the car, petitioner's argument that the trial court should have found a violation of the Safety Appliance Act as a matter of law must fail. The most that can be said for petitioner's evidence is that it marginally entitled him to an instruction on the Safety Appliance Act and submission of that issue to the jury, both of which occurred. The jury specifically found that respondent had not violated the Safety Appliance Act, and the jury's determination should not be disturbed.

CONCLUSION

Petitioner's requested instruction No. 47 was properly refused by the trial court. Petitioner did not present any evidence of a violation of a Federal Railroad Administration regulation at the point where the accident occurred. Neither did petitioner present any evidence at trial relating to the Federal Railroad Administration regulations, nor were the regulations offered into evidence. The highly technical nature of these regulations, without the aid of clarifying testimony, would have only served to confuse the jury.

Petitioner did not present any evidence that the engineer was unable to activate the power brakes on any of the 112 cars comprising Train X-59. Absent such evidence, a violation of the Safety Appliance Act was not established as a matter of law. Thus the trial court properly denied petitioner's motion for a directed verdict, and submitted the Safety Appliance Act issue to the jury.

The trial court properly applied the applicable federal law in this FELA action. Therefore, respondent respectfully requests this Court to deny the petition for writ of certiorari.

Dated: April, 23, 1984.

Respectfully submitted,

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